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## FEDERAL TRADE COMMISSION'S PROPOSED FUNERAL INDUSTRY TRADE REGULATION RULE: ITS EFFECT ON SMALL BUSINESS

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Mr. STEED of Oklahoma, from the Committee on Small Business,  
submitted the following

## REPORT

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# FEDERAL TRADE COMMISSION'S PROPOSED FUNERAL INDUSTRY TRADE REGULATION RULE: ITS EFFECT ON SMALL BUSINESS

## CHAPTER I.—INTRODUCTION

The Committee on Small Business of the United States House of Representatives created six subcommittees at the beginning of the 94th Congress, each of which was given a specific field for investigation. The Subcommittee on Activities of Regulatory Agencies was assigned jurisdiction concerning oversight, investigation and review of all problems affecting small businesses relating to concentration, monopoly and other matters involving regulatory agencies, as well as unfair and deceptive trade practices, advertising techniques, credit regulation, monopolistic practices, and antitrust and anticompetitive practices. Oversight, a key responsibility, was to encompass three areas of concern:

1. Review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within its jurisdiction, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated. In addition, review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within its jurisdiction (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within its jurisdiction.

2. Review and study, on a continuing basis, the impact or probable impact of tax policies affecting subjects within the jurisdiction.

3. Study and investigate, on a continuing basis, the problems of all types of small business.

The following Members were appointed to the subcommittee:

Representative William L. Hungate, chairman.<sup>1</sup>

Representative Berkley Bedell.

Representative John J. LaFalce.

Representative Martin A. Russo.

Representative Alvin Baldus.

Representative Jack Hightower.

Representative John D. Dingell.

Representative Floyd J. Fithian.

<sup>1</sup> Mr. Hungate resigned as subcommittee chairman effective September 7, 1976 and was replaced by Representative John Breckinridge of Kentucky.

Representative John Y. McCollister, ranking minority member.  
 Representative William S. Cohen.  
 Representative Millicent Fenwick.

Additionally, Full Committee Chairman Joe L. Evins<sup>2</sup> and Ranking Minority Member Silvio O. Conte were named *ex officio* members of the subcommittee. Stephen P. Lynch was appointed professional staff member to the subcommittee in the position of majority counsel. Later, Jerrold S. Jensen was appointed minority counsel to the subcommittee. Mary Lou Liggon, Jeannie Frederick, and Linda Parker served as subcommittee clerical assistants.

### *A. Purpose and Scope*

On August 29, 1975, the Federal Trade Commission published a proposed trade regulation rule for the funeral industry (40 F.R. Aug. 29, 1975, p. 39901). Members of Congress, as well as members of the House Small Business Committee, immediately began receiving a large volume of mail about the rule. Many letters noted general objections to the rule; others cited specific sections; some questioned the burdensome paperwork the rule would require; and a few questioned the basis for the Commission's action.

In asking Congressman William Hungate's Subcommittee to conduct a preliminary review of the proposed FTC funeral regulations, the former chairman of the House Small Business Committee, Joe L. Evins, said:

Several State funeral associations, as well as a significant number of small funeral home operators, have expressed concern over the proposed regulations. Funeral home directors who are small businessmen have indicated that it is their belief that the proposed FTC regulations would have an adverse effect on independent small businessmen in the industry.

The preliminary study indicated that approximately 90 percent of the funeral industry could properly be classified as "small business" with annual receipts well under the Small Business Administration \$2-million level and a national average of only 2.3 full-time employees.

Thus, former Subcommittee Chairman Hungate called a meeting of the subcommittee to determine whether the subcommittee was interested in holding hearings on the funeral industry and the proposed FTC trade regulation rule. Subcommittee members, in a unanimous decision, expressed their interest not only in holding hearings on the funeral industry and the proposed regulations, but also in expanding the scope of the hearings to include matters relating to FTC jurisdiction.

The FTC, at the time, had under consideration approximately 20 proposed trade regulation rules and members of the subcommittee were anxious in using their FTC oversight responsibility to examine the FTC at work with a proposed trade regulation rule under the Magnuson-Moss warranty—FTC Improvement Act (Public Law 93-637). Interest was voiced in looking at the FTC's new substantive rulemaking authority and the extent, if any, of the Commission's preemption of State law.

<sup>2</sup> Mr. Evins resigned as Full Committee Chairman effective August 30, 1976 and was replaced by Representative Tom Steed of Oklahoma on August 31, 1976.



Members of the subcommittee considered the hearings an opportunity to get a preview of FTC trade regulation rules to come. The quality and tenor of the regulation was regarded as an indicator of what Congress could expect from the FTC as a result of its newly empowered substantive rulemaking authority under the Magnuson-Moss warranty—FTC Improvement Act.

Representative Hungate unequivocally stated the purpose of the hearings:

Our purpose here is to see how this regulation affects small business. I expect that is our primary concern. (March 25, 1976 hearing transcript, p. 18.)

Representative Conte, ranking minority member of the House Small Business Committee, posed four questions in defining the scope of the hearings:

First, does the FTC have the authority to do what it proposed to do? Second, even assuming the authority, should the FTC have picked the funeral industry to saddle with such comprehensive Federal control? Third, assuming the authority and justification for regulation, are the regulations reasonable? And finally, what, if anything, should this subcommittee do about the answers to the first three questions? (Hearings, pt. III, p. 79.)

### *B. Background*

Funeral homes in the United States number approximately 22,000. They handle approximately 2 million deaths in the United States each year.

After a preliminary investigation, the FTC staff in the Division of Special Projects in the Bureau of Consumer Protection recommended to the Commission, in July of 1973, that a formal industrywide investigation be initiated into the funeral industry.

As a result of their formal investigation, the Division of Special Projects recommended to the Commission, on August 20, 1975, that its Funeral Industry Practices Trade Regulation Rule was the most direct and efficient way to eliminate unfair and deceptive acts or practices in the funeral industry, which the staff claimed were industrywide. (Proposed Trade Regulation Rule and staff memorandum, Division of Special Projects, Bureau of Consumer Protection, August 1975.)

The gravamen of the staff's investigation is the alleged inherent conflict between the funeral director's professional role and his economic self-interest, at a time when he is dealing with bereaved customers who are not emotionally in a position to bargain effectively. The staff memorandum states:

Each year, millions of families are forced by the death of a relative to make one of the largest consumer purchases, under severe handicaps of time pressures, emotional distress, and lack of information or experience. As an FTC hearing examiner noted long ago, there are few, if any, industries where the ultimate consumer is so disadvantaged or where his normal bargaining power is so diluted in a situation of such immediate need.

The need for protections for funeral buyers is particularly acute because the funeral director plays two conflicting roles. His public relations image emphasizes his duties as a professional serving people at a time of particular desperation. His economic self-interest puts him in a different role: he is a salesman of goods and services to these same people; and, if he wants to prosper or even to survive, he must move his high profit lines. (Staff Memorandum, pp. 2-3.)

The Staff Memorandum continues on to list what the staff considers to be "general marketing strategy of much of the industry . . ." (Staff Memorandum, p. 4). Those alleged strategy precepts are (Staff Memorandum, pp. 4-5):

1. Elimination of low-cost funeral alternatives through control of laws, regulations, and codes of ethics.
2. Inhibiting the development of memorial societies.
3. Refusing to give price information over the telephone.
4. Selling the customer unneeded items.
5. Confusing the customer.

To rid the marketplace of the above-listed abuses, the Bureau of Consumer Protection proposed its funeral industry trade regulation rule to the Commission. A short section-by-section summation of the regulation follows:

*Section 453.1—Definitions.*—Defines certain terms and definitions relating to the industry.

*Section 453.2—Exploitative practices.*—Defines as an unfair or deceptive act or practice: Embalming without obtaining permission from next of kin, obtaining custody of the remains without permission, refusing to release the remains on request, requiring purchase of casket which will only be cremated with the remains, profiting on items the consumer thinks are cash advances (for example, cemetery charges, flowers, limousines, etc.).

*Section 453.3—Misrepresentations.*—Defines as an unfair or deceptive act or practice any merchandising technique that uses misrepresentation to persuade the customer he has no choice except to purchase certain offered goods or services. This involves misrepresentations of law, public health necessity, religious customs, and facts concerning preservation of the remains.

*Section 453.4—Merchandise and service selection.*—Defines as an unfair or deceptive act or practice any manipulative sales techniques involving funeral related merchandise. Most of the section discusses casket prices, since the casket is the major expense in most funerals. This section covers the failure to display least expensive caskets, the failure to disclose the availability of other colored caskets, methods of interference with the customer's selection of offered items and disparagement of concern for price.

*Section 453.5—Price disclosures.*—Defines as an unfair or deceptive act or practice any alleged systematic denial of access to price information by most of the industry. This section requires disclosure of price information over the telephone, requires a casket price list, requires display of casket prices, requires vault disclosure and price list and a price list and memorandum of the funeral selected.

*Section 453.6—Interference with the market.*—Defines as an unfair or deceptive act or practice any interfering with the offering of inexpensive funerals, interference with price advertising, tampering with price advertising restrictions, or failure to employ the price availability notice.

*Section 453.7—Retention of documents.*—This section requires the funeral director to maintain certain documents for inspection for a period of 3 years. Included in the documents are copies of written disclosures of price lists required by sections 3 and 5 and all revisions thereof. Also the selection memorandum required (section 5) must be available for inspection.

Under the Magnuson-Moss Warranty—FTC Improvement Act, § 202(b), the Commission, in proposing a trade regulation rule, must proceed in accordance with section 553 of title 5, U.S.C., and must also: (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions available to the public; (3) provide any opportunity for an informal hearing in accordance with subsection (c); and (4) promulgate, if appropriate, a final rule based on the matter in the rule-making record together with a statement of basis and purpose.

Notice was published August 29, 1975.

## CHAPTER II.—SUMMARY OF HEARINGS

From the outset, the subcommittee's intent was to hear all sides of the issue. In outlining the approach to be taken, in his initial introductory remarks, Chairman Hungate stated:

In the early phase of our work, we will examine the proposed regulations themselves. After this has been completed, we shall examine the Commission jurisdiction to issue such rules as well as the FTC staff procedures involved in original staff study and subsequent proposal of rules. (Hearings, pt. III, p. 68.)

Three days of hearings were held to hear from industry and consumer groups for and against the proposed regulation. Two days of hearings were held to consider the matter of FTC jurisdiction, and one hearing was held with the appropriate FTC staff personnel.

### *A. Arguments against the rule*

A constant theme voiced in hearings before the House Small Business Committee is the threat Government regulation poses to the viability of small businesses. The funeral directors were no different. They questioned whether the FTC had adequately given due consideration to the problems of small business, while still serving the best interests of the consumer, when proposing the funeral Trade Regulation Rule.

#### *Burden for small business*

Mr. Gene S. Hutchens, president of the Missouri Funeral Directors Association, listed the time and cost burdens imposed upon the average funeral home owner by the proposed funeral regulation as being: (1) Additional time spent with customers at the arrangement conference, to explain the disclosures, pricing, and options required; (2) additional time spent in routine bookkeeping on a daily basis to prepare additional documentation; (3) additional time spent in marking, identifying, and pricing merchandise, and conforming same to the required pricing documents; (4) retention, indexing, storage, and records which the rule requires to be kept for 3 years; (5) additional time spent in accumulating, producing, and justifying records when the FTC conducts an audit; (6) loss of storage space for records; (7) cost of printing the required forms, disclosures, and documentations; (8) additional advertising costs; (9) additional cost of providing price information by telephone upon request; (10) cost of producing additional warehousing space and inventorying additional caskets; (11) more costly bookkeeping and accounting systems; (12) the loss of business caused by the requirement that the funeral director advise the client to check with the cemetery before buying a burial vault or grave liner; (13) additional cost of "carrying" cash advanced items which must be paid for immediately. (Hearings, pt. III, p. 369.)



The funeral directors, without exception, were concerned with the adverse effect these additional expenses would have on their businesses and their customers. "If it doesn't put the firm out of business it will at least increase costs to the consumer," said Howard Raether, executive director of National Funeral Directors Association. (Hearings, pt. III, p. 73.) And the proposed regulation will, according to the funeral directors, give the larger funeral home the advantage. "A large firm is better able to adjust its variable expenses than is a small firm because the latter has a greater ratio of fixed expenses than does the large one," said Raether. (Hearings, pt. III, p. 73.)

#### *Black funeral directors*

The subcommittee heard testimony from representatives of the funeral industry from the black community, who complained that the FTC had not consulted or studied their views. Mr. Robert H. Miller, executive secretary of the National Funeral Directors and Morticians Association, Inc., stated that in big cities like New York, Chicago, St. Louis, and Philadelphia, 90 percent of the black funerals are held at night, but when representatives of the black segment of the industry complained to the FTC staff, the staff did not know anything about night funerals.

#### *Specific sections*

Objections to specific sections of the proposed funeral T.R.R. were as follows:

##### A. § 453.2 EXPLOITATIVE PRACTICES

Paragraph (a) of § 453.2 requires a funeral director to obtain written or oral permission from a family member or other person authorized by law before embalming a corpse. Under normal conditions the obtaining of permission before embalming was not objected to by the funeral directors. Rather, the objection was the lack of a provision for the all too frequent situation in which a family member or other legally authorized person was unavailable for any number of reasons, including travel, or not knowing who next of kin is. Embalming, in most instances, it was pointed out, is a needed service. Mr. Raether stated, "If there is to be a wake or viewing period, or if the body is to be present for any period of the funeral, in either an open or a closed casket, it should be embalmed for reasons of sanitation, odor, and presentability." (Hearings; pt. III, pp. 67-68.) Mr. Sampson, of the Missouri Funeral Directors Association said—

If you eliminated the embalming there would be the cost of the refrigeration or storage of a body until such time as disposition could be made. When we did a local survey of our area of what hospitals charge for the use of their morgues, it was \$100 per day. (Hearings, pt. III, p. 329.)

Mr. Sampson stated that in his State the price of embalming would probably range from \$35-\$100.

Under the regulation, if a funeral director is unable to contact the next of kin he is prohibited from embalming and is forced into either immediate disposition of the body or refrigeration, which is much more expensive than embalming.



## B. § 453.3 MISREPRESENTATION

Paragraph (a)(1) makes it an unfair trade practice to make any statement or claims, written or oral, which expressly or implicitly contradict, mitigate, or detract from the printed disclosures which are required by paragraph (a)(2) of this section or which are false, misleading, or unsubstantiated . . .

Witnesses questioned what oral statements they could make, how one determines what is misleading, and how this section would be enforced.

Paragraphs (a) (2) and (3) were probably the most strenuously objected to provisions of the entire T.R.R. Making it an unfair trade practice for funeral directors to fail to provide a statement of what is not required by law was looked upon as an abhorrent way to conduct a business. As Mr. Raether said:

What profession, business or industry is required during a transaction to state what is not required by law? (Hearings, pt. III, p. 69.)

Furthermore, § 453.3(a)(3) requires the funeral director to furnish the customer, upon request, with a written "explanation of legal requirements, including public health regulations, which necessitate the use of services or merchandise." Again, witnesses asked, who else is required to furnish a legal explanation of the law governing their business?

## C. § 453.5 PRICE DISCLOSURE

The funeral directors who appeared before the subcommittee expressed no objection to the concept of price disclosure; rather, their objection was with the FTC's mandated method.

Price information over the phone and price lists were commented on. Though many funeral directors provide price information over the phone, those who do not explained that it was because customers need "more than a passing knowledge of a funeral to make an intelligent inquiry" (Robert P. Shackelford, Mar. 25, 1976, hearing transcript, p. 13). Moreover, Mr. Shackelford added—

. . . the cost associated with staffing a phone service and the mailing costs involved in complying with consumer requests add yet another dimension to our cost of doing business. (Shackelford, Mar. 25, 1976, hearing transcript, p. 13.).

The National Funeral Directors Association testified that as an association they were in favor of having funeral directors furnish price information over the telephone.

Paragraph (e) requires that an itemized price list of all goods and services available for a funeral be provided to customers. Testimony received echoed the remarks of Mr. Shackelford, who stated:

This subject is not new within the funeral industry as it has been a fertile ground for discussion in the past. Unlike many of the areas touched by the rules, empirical data on the effect of itemization reflects that the cost of the funeral, in the areas where itemization is required, have increased. Undoubt-

edly, the low cost funeral will vanish in the wake of itemization, and the staff of the Commission seems to acknowledge this conclusion by providing for a packaged price funeral at a yet undetermined amount. (Shackelford, Mar. 25, 1976, hearing transcript, p. 13.)

Regarding why some funeral directors favor itemization and others do not, Mr. Edward Carney, first vice president of the Massachusetts Funeral Directors Association, said:

I'm a small business funeral director and last year, 1975, we did 97 funerals regulated by the State Board of the Funeral Directors of the State of Massachusetts. We offered both a complete listing and also offered itemization. I prefer some type of itemization. Many people like to know the variables. However I find that in most instances the average family that I'm dealing with are not so much interested in how much it is going to cost to embalm or how many automobiles they should have; no they want the total. So we have to arrive at a total. (Hearings, pt. III, p. 331.)

Overall, the funeral directors appearing before the subcommittee supported the FTC's purpose of providing the customers with price information. The issue became: How is the best way to do it? And on that point not even the funeral directors agreed among themselves. But they did agree that the FTC's price itemization tends to increase the cost of funerals.

#### *Shadow of distrust*

Funeral directors and their associations expressed their regret over the proposed regulation's blanket indictment of all funeral directors. Media publicity for the proposed regulation has already cast suspicion on the entire industry, characterizing instances of abuse as prevalent. Even worse, however, the witnesses argued, is the unfavorable image the regulation will give the honest, reputable funeral director. Requiring any businessman to supply customers with a statement stating what is not legally required for the services provided and a statement advising customers that they "may want" to contact a competitor creates what Mr. Shackelford referred to as, "a shadow of distrust."

#### *B. Arguments for the rule*

Appearing before the subcommittee on behalf of consumer interests were the American Association of Retired Persons and the National Retired Teachers Association, representing 8.7 million retired persons, and the Continental Association of Funeral and Memorial Societies, representing 130 nonprofit cooperative funeral and memorial societies.

#### *Need for T.R.R.*

At the basis of their support for the regulation was what Ms. Rebecca Cohen, executive secretary of Continental Association of Funeral and Memorial Societies, considered to be the reason the FTC chose the funeral industry for a T.R.R.:

It is in large measure because of the consumer's peculiar vulnerability, the pressures of time, and the emotional effect of the death of a relative or close friend which render

the customer's decisions less deliberate and more emotional than with other major purchases. (Hearings, part III, pp. 429-430.)

Both groups focused on the fact that a funeral is one of the single largest expenditures for many people and yet it is an area in which consumers are surprisingly uninformed. Dr. Esther Prevey, speaking for the American Association of Retired Persons and the National Retired Teachers Association, said:

Studies by the industry and our own association's study lend powerful support to the thesis that consumer knowledge, a necessary requirement for the functioning of the competitive process, is woefully lacking and that existing industry regulation has failed to alter this fact. (Hearings, part III, p. 387.)

#### *Reasons for support*

Both Ms. Cohen and Dr. Prevey referred to a large volume of mail as support for their position. Mention was made by both to a 1974 article in "Modern Maturity," a journal of AARP, regarding memorial societies and examples of high funeral costs, which generated approximately 15,000 letters, and Dr. Prevey said, "\*\*\* Our offices in Washington continue to receive 40 to 50 letters a day from all over the country citing specific instances of unfair and deceptive practices." (Hearings, pt. III, p. 390.) (It was subsequently pointed out that this reference was only to the previous week.) (Hearings, pt. III, p. 402.)

Some of the alleged abuses included customers being (a) told that State law required the purchase of a cemetery plot even though the deceased was to be cremated; (b) charged \$1,600 for unspecified professional and staff services; (c) charged for embalming even though the deceased was cremated; (d) charged a 1,000-percent markup for the cost of 2 burial vaults; and (e) quoted a price of \$550 for a pickup, delivery and death certificate when someone else would perform the same service for \$150.

The difficulty consumers have in obtaining information about funerals was an item about which the witnesses vigorously objected. Witnesses accused funeral directors of refusing to give price information over the phone, refusing to give price information for various components of a funeral, giving misinformation about local legal requirements, using a sales pitch to sell more expensive goods and services, and refusing to deduct costs for items not selected.

As an example of the difficulty in getting price information, Ms. Cohen referred to the incident in the hearings the previous day in which a member of the subcommittee had an extremely difficult time getting an answer from a funeral director as to how much he would deduct from a funeral if the customer did not want an embalming. (Hearings, pt. III, pp. 90-91.)

Dr. Prevey explained that her comments were not to be interpreted as a "blanket endorsement of the rule." (Hearings, pt. III, p. 387.) "We have found," she said, "specific requirements under the rule which we believe are unduly restrictive. For example, prohibitions against discouragement by the funeral director of a customer's concern for price, in our opinion infringes upon the right of the funeral director to conduct his business." (Hearings, pt. III, p. 387.)

On the other hand, proponents of the rule were ardent supporters of the concepts of price advertising, itemization of costs, and in general making more information about funerals available to consumers. Ms. Cohen said the proposed FTC funeral T.R.R.:

\* \* \* would insure that each customer or potential customer is provided with information about low-cost as well as high-cost goods and services. It would insure that the customer is not supplied with goods and services that he has not ordered or charged for goods and services that have not been provided. It would penalize funeral directors for misrepresentations of fact or for using sales tactics designed to take advantage of the emotional state of the purchaser, such as disparaging concern for cost or misrepresenting the purpose or value of embalming or "sealer caskets." It would prohibit interference with price advertising or with the offering of low-cost funerals, cremations or memorial society plans. (Hearings, pt. III, p. 430.)

Mrs. Virginia Knauer, Special Assistant to the President for Consumer Affairs, submitted to the subcommittee a statement prepared for the FTC in which she said:

We expect that the regulations proposed will be a competitive tool for the middle sized and small funeral home. Increased disclosure will make comparison shopping for funeral services easier and those smaller firms who choose to compete on price will benefit from these regulations. (Knauer statement, p. 16.)

Both Dr. Prevey and Ms. Cohen also addressed the issue of small business. Dr. Prevey said:

In conclusion, we feel the long-term effects of the rule will favorably affect the transaction between the funeral director and a customer. The alleged adverse results upon small business, we feel, is heavily outweighed by the benefits to be derived for the consumers. The associations' members are clearly calling for reform of the laws and regulatory guides governing this industry. We do not feel this should be viewed as an unreasonable intrusion upon small businesses or upon the States or their subdivisions. Based upon the overwhelming response from our members, we strongly feel this rule is definitely in the public interest. (Hearings, pt. III, p. 391.)

Ms. Cohen said:

We do not view this rule as antibusiness, especially small business. We view it as pro-good business. Moreover, we cannot escape the conclusion that any business feeling threatened by such commonplace standards of fair conduct must rely unduly on keeping the customer in the dark about what his choices are and what he is paying for. (Hearings, pt. III, p. 430.)

Consumer advocates of the proposed FTC funeral T.R.R. definitely think the rule would be an effective curb to exploitative and unfair trade practices in the funeral industry, a stimulant to competitive



funeral pricing and lower cost funerals, and, most importantly, a medium through which a consumer could gain sufficient information to make educated decisions in selecting a funeral.

### *C. The Question of FTC Jurisdiction*

Section 202(a) of the Magnuson-Moss warranty—FTC Improvement Act provides that the Federal Trade Commission “may prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”

Rather than holding court and considering the legal issues of whether the funeral industry “affects commerce” or whether the FTC Improvement Act authorizes the FTC to preempt State law, the subcommittee went to the heart of the FTC Improvement Act and questioned the very precept upon which the Magnuson-Moss warranty—FTC Improvement Act is built. Should the FTC have extensive, substantive rulemaking authority?

Since the Commission was, at the time, considering twenty proposed T.R.R.’s, one of which became effective on May 14, 1976 (Preservation of Consumers’ Claims and Defenses, 40 Fed. Reg. 53506, Nov. 18, 1975), the testimony given before the subcommittee covered many provisions of the various T.R.R.’s under consideration by the FTC, the efficacy of having the FTC issue regulations affecting those industries, and the effect of those regulations on small business.

Peter A. White, of the National Chamber of Commerce’s FTC Issues Working Group, regarded the fundamental question as: “\* \* \* whether the very exercise of rulemaking, as it now exists under the FTC act, is itself prudent and consonant with the principles of Government embraced by the Constitution.” (Hearing transcript, Apr. 6, 1975, p. 23.)

Mr. White focused specifically upon the Commission’s use of the “unfairness standard” and asked:

What is unfair?

\* \* \*

Are there circumstances in which it is unfair to make a profit, as the Commission has suggested in its funeral industry rule? What State laws must yield because they are unfair to consumers?

The list of questions is endless because the concept of unfairness is itself unending. It has no bounds. It lies in the eyes of the beholders, in this case the staff and members of the FTC.

Furthermore, the vagueness of unfairness is increased in the context of rulemaking, which itself has ill-defined boundaries. The FTC was originally intended to be a “cease and desist” agency. But under rulemaking, it may apparently order any affirmative or negative action it wishes to obviate the practice it deems unfair. Indeed, it may alter the very structure of an industry. The FTC is today the second most powerful legislative body in the United States. (Hearing transcript, Apr. 6, 1975, pp. 25–26.)



Also in questioning the Commission's parlaying of its negative definitional power to define and prescribe unfair or deceptive acts or practices, into an affirmative power to prescribe fair acts and practices, Congressman M. Caldwell Butler testified and said: " \* \* \* the proposed rules which have come to my attention appear to me not so much to define with specificity acts or practices which are unfair, but to prescribe rules with specificity which are, in the Commission's opinion, fair." (Hearing transcript, June 16, 1976, pp. 4-5.)

Mr. Butler also questioned the Magnuson-Moss warranty—FTC Improvement Act's expanding the Commission's jurisdiction to include acts or practices which are not "in," but "in or affecting" commerce.

In my opinion \* \* \* the incidental effect on interstate commerce in some of the industries to be regulated, like the funeral industry, is *de minimus*. The Federal Government should leave the regulation of those industries to the States, in the absence of an express congressional directive to do otherwise. (Hearing transcript, June 16, 1976, pp. 6-7.)

He also strenuously objected to the FTC's regulation preempting State law.

Finally, there is the problem of Federal Trade Commission preemption of State law. I do not challenge the authority to preempt State law by Federal regulation, but I do question the political wisdom of allowing individuals who are totally out of the mainstream of our political election system to nullify State laws which have undergone the legislative process.

The jurisdiction which the FTC has acquired will always have an effect on small business and, not infrequently, an adverse one. (Hearing transcript, June 16, 1976, p. 7.)

Ms. Nancy Buc, however, representing the National Retail Merchants Association, spoke to the issue of the "small retailers' need for uniform laws" and how the FTC could significantly benefit small businesses. Ms. Buc referred to small businesses, which operate interstate, and are required to comply with, and fill out forms for, city, State and Federal laws and regulations—laws and regulations which are not fundamentally in opposition to one another, but which are duplicative with relatively minor differences. As examples, she listed the areas of advertising, warranties, packaging and labeling, mail order merchandise, door-to-door sales, care labeling and energy labeling. She added:

Regulations in each of these areas are replicated, to a greater or lesser degree, by each State and many localities.

Please note that in each of the areas I have just mentioned, the Federal Trade Commission and the states are not fundamentally at odds on whether or how to regulate. Thus, none of these areas raises the basic question—which does arise in other areas—of whether the FTC ought to be involved at all. The areas in which NRMA is urging preemption in the interest of uniformity are those in which the FTC is acting well within its traditional mandate under the Federal Trade Commission Act, or pursuant to specific legislation such as

the Magnuson-Moss Warranty Act. In such circumstances, preemption does not pit the Federal Government against the States, but rather, is a means of reducing relatively minor differences between two or three levels of Government. (Nancy L. Buc, statement, June 16, 1976, pp. 5-6.)

In general, the two days of hearings on the matter of FTC jurisdiction resulted in testimony deprecating the FTC's lack of circumspection in proposing T.R.R.s for industries which (a) are essentially intrastate; (b) have an adverse effect on small business; and (c) essentially prescribe "fair" acts or practices rather than proscribe "unfair" acts or practices. Witnesses also deprecated (a) the Magnuson-Moss warranty—FTC Improvement Act's lack of a provision prohibiting the Commission's preemption of State law; and (b) section 202(a) of the act giving the Commission substantive rule-making authority over essentially intrastate trade practices, like the funeral industry, which only incidentally affect interstate commerce.

#### *D. FTC Funeral Staff Testimony*

A hearing with the staff members from the FTC's Bureau of Consumer Protection, Division of Special Projects, who are responsible for the drafting of the proposed funeral T.R.R., resulted in a lively interchange and marked the first hearing for Congressman John Breckinridge as the subcommittee's new chairman. Witnesses included: Mr. Arthur R. Angel, FTC staff attorney; Mr. Thomas C. Nelson, consultant; and Mr. James V. DeLong, assistant director, Division of Special Projects. Also requested to appear were Ms. Susan C. Martell, research analyst; and Mr. William P. Golden, staff attorney. Ms. Martell is no longer with the Commission and Mr. Golden was out of town.

Areas of discussion were: (1) FTC concern for small business; (2) FTC jurisdiction; and (3) merits of the proposed funeral regulation.

#### 1. FTC CONCERN FOR SMALL BUSINESS

Chairman Breckinridge referred in his opening remarks to the FTC Staff Memorandum on Funeral Industry Practices, which states that there is a "considerable excess capacity and an oversupply of small firms" in the funeral industry. Chairman Breckinridge noted the "peculiar insight" this gives us when coupled with the FTC staff observation that as a "result of this excess supply there is an increase in cost." "Generally," the Chairman noted, "we consider just the opposite effect, that competition is increased by oversupply." (Hearing transcript, September 15 1976, p. 93; see FTC staff memorandum, pp. 90, 97.)

Mr. Arthur Angel defended the memorandum's reference to "an oversupply of small firms" by saying:

It is not the position of the FTC staff that we either have the authority to, or that we intend to determine the number of businesses—small or otherwise—in this industry or in other industries that we have addressed ourselves to. We are solely interested in allowing the free market concept of competition to operate as free from artificial restraints as possible, and let

the free market economy operate as it is supposed to throughout the economy, to determine the number of businesses.

The information that you referred to about the oversupply was in a reporting of fact that we gathered in the course of the investigation; and, in fact, statements about the overcapacity have been made for 40 years by industry spokesmen. Wilbert Krieger, who used to be the head of the National Selected Morticians, indicated in Congressional testimony, statements, and books that he thought there were many more funeral homes than were necessary to serve the amount of business they had each year \* \* \*

Our point here is simply that if there is an oversupply and overcapacity, the absence of price advertising and restrictions, artificial restrictions on price advertising, and obstructions to the consumer's access to information on prices charged by different funeral homes impeded the process of competition from determining how many funeral homes the market could support. (Hearing transcript, September 15, 1976, pp. 167-168.)

Both Congressmen Breckinridge and Russo, however, took the opportunity to point out the apparent contradiction in the FTC's spending \$449,000 in 20 months on proposing a rule to regulate the funeral industry, which is composed mostly of small businesses and has relatively few consumer complaints, and yet chooses to ignore in large part enforcement of the Robinson-Patman Act, which is designed to protect small business.

The FTC staff before the subcommittee, of course, are not responsible for the enforcement of the Robinson-Patman Act, but both Congressmen Breckinridge and Russo saw, as a result of their membership on the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters, what appeared to be a lack of concern on behalf of the FTC for the problems of small business.

## 2. FTC JURISDICTION

Chairman Breckinridge initiated the discussion on FTC jurisdiction by questioning the criteria by which the Commission establishes priorities for regulation. The subject brought to light the issue of whether the Magnuson-Moss warranty—FTC Improvement Act was producing its intended results. Mr. Russo asked how a FTC staff person decides to initiate an investigation. Mr. DeLong answered:

If from whatever source, secondary sources, books, newspapers, consumer complaints, experience, for any reason a staff member becomes interested in a particular area, it is fairly easy for him to get permission to spend a couple days looking. Once he goes beyond that point, in terms of resource commitment, he has to get approval from the assistant bureau director and from the bureau director to open a formal file. At this point he has to be able to assure his superiors that there is at least enough indication that there may be problems in the area that the FTC should look at. (Hearing transcript, September 15, 1976, p. 123.)

Mr. Russo asked, "Why did you investigate the funeral industry in the first place?"

To which Mr. Angel responded:

We looked into the funeral industry because it occurred to us this was a transaction in which there was a potential for the consumer to be victimized due to bereavement and the commonsense notion that a person who is making funeral arrangements operates at some emotional disadvantage. (Hearing transcript, September 15, 1976, p. 117.)

The staff indicated that when they first began to look into problems associated with the funeral industry, the FTC had "less than a dozen" consumer complaints and at present they have approximately 700-1,000 letters from consumers.

The concern so vigorously voiced by members of the Subcommittee was that with less than a dozen complaints, the FTC would launch into a \$500,000 project when there were so many other areas in which complaints existed that demanded attention by the FTC. Mr. Breckinridge said:

The people might well be served best by hearing their problems and their complaints in areas of prima facie violations of the law, rather than self-initiated areas where neither the magnitude nor complaints appear to warrant the expenditure of money that we are talking about here. (Hearing transcript, September 15, 1976, pp. 109-110.)

Mr. DeLong explained:

\* \* \* That this proceeding has cost more money than we anticipated, certainly. In large part, I think because there has been rather tenacious opposition to the rule, a lot of comments have been filed. We have an obligation to read those comments, try to index them, and put them on the record, and try to make the record whole. (Hearing transcript, September 15, 1976, p. 120-121.)

Mr. DeLong also explained that a purpose of the hearings is to inquire into the prevalence of the practice, why it is unfair, the economic effects on small business, and to determine whether or not Government action is justified.

Still, members were not placated. Congresswoman Fenwick, for example, who, as the Director of the Division of Consumer Affairs for the State of New Jersey was responsible for New Jersey's implementation of funeral regulations, queried:

Mrs. FENWICK. \* \* \* Did you consult the various consumer divisions of the States to see what they had in the way of complaints?

Mr. ANGEL. Number of consumer complaints? Only sporadically, only in a couple of States did we do that.

Mrs. FENWICK. Well, now, gentlemen, seriously, your own kind hearts and six letters—they have consumer divisions in almost every State of the Union, and all you have to do is write a letter. In many states it is the Division of Law and Public Safety it comes under, and in some the Department of Agriculture which I don't understand.



But nevertheless, there are consumer divisions and they receive complaints. And this surely would be the first obligation, and it really constituted an inexpensive way of finding out what the situation is in the Nation. If you had written and had found out they had 15 complaints in 8 years, wouldn't that have told you something?

Mr. ANGEL. It would have told us something, but not everything, Congresswoman. The point, I think, that really needs to be emphasized here is that consumer complaints simply do not give you anywhere near the full picture of what kinds of abuses or problems exist.

Mrs. FENWICK. What makes you think so, sir?

Mr. ANGEL. Three and a half years of research, interviewing people.

Mrs. FENWICK. I ran the division of consumer affairs.

Mr. ANGEL. I understand that.

Mrs. FENWICK. And I promulgated regulations. I just simply do not agree with you, there is no better way of knowing. If I were a Federal Trade Commissioner I would have taken a bit more interest in the *Pyramid* case—now there is real abuse, involving activities in one State very difficult to control on another State level. The Federal Trade Commission has certain things, in my opinion, that only it can do. Package deals that stranded poor schoolchildren in Paris, and I couldn't control it because it was organized in another State. I have dozens of things that I could hand you in the way of problems. To get triggered off by six letters and your kind hearts when you have thousands of consumers begging for help in other areas is to me absolutely an incredible way of operating an agency.

Mr. ANGEL. Your characterization is unfair. It was not our kind hearts and six letters which triggered the investigation, I tried to make that clear before. I guess I failed at that.

Mrs. FENWICK. Yes.

Mr. ANGEL. We spent approximately 6 months reading magazine articles, dissertations, interviews with funeral directors.

Mrs. FENWICK. That is pointless.

Mr. ANGEL. It is not pointless.

Mrs. FENWICK. Look, you took 6 months, and I don't know what that cost the taxpayers. But during those 6 months I could have given you several things, thousands of people are hanging on the ropes. Surely, if we are going to choose—I don't mean to get so excited, and I'm sorry—but if you just knew what my consumers in New Jersey have been up against, and that Mr. Givens of the FTC told me in all good faith, that he just didn't have the manpower to do anything about it. And you sit down here in Washington taking 6 months to read magazines about what is going on in the funeral industry. I could have told you, we were doing it. I was only there 15 months, and this is one of the many regulations promulgated during my time.

Mr. ANGEL. We have regulations, too.



Mrs. FENWICK. I mean, it doesn't take all that long time. I had six lawyers in my division, and we worked on this. How did we do it? We assembled the complaints, got the funeral industry to come in and worked it out. And if my lawyers and I felt this was not enough and they were not prepared to give, we would force more. (Hearing transcript, September 15, 1976, pp. 125-128.)

Later in the hearing when the topic of State consumer agencies was broached, Mr. Angel stated:

In the course of the hearings we had testimony from half a dozen department heads of consumer agencies of the kind you are referring to, and virtually all of them came down and concluded, "Yes, indeed, the number of consumer complaints was small," they reported small numbers of the kind that you referred to. But they usually added that to them, based on their experience working in the State, really did not signify the full range of the problem.

They supported our efforts to develop regulations for the funeral industry, even though concededly the number of complaints was quite small. (Hearing transcript, September 15, 1976, p. 138.)

Mr. Angel emphasized to the subcommittee that, though he was the originator of the FTC study into the funeral industry, he is not the person who determines Commission priorities. Rather, his testimony related to telling the subcommittee what knowledge the FTC staff had on the funeral industry, not how priorities are established at the Commission.

Finally, relating to FTC jurisdiction, was the matter of interstate commerce. Mr. Breckinridge wondered if perhaps the FTC was drifting into becoming a metropolitan consumer protection agency rather than a major national entity, directed at major national concentrations. He also suggested the subcommittee might pay some particular attention to thinking and structuring the relationship between the multitude of agencies at the Federal, State and local levels.

As one who had been responsible for the promulgation of funeral regulations at the State level, Mrs. Fenwick said:

I would just like to suggest, really, that these laws concerning funeral directors can be made in the States, as we now are. What we cannot do at the State level is what I wish the Federal Trade Commission would concentrate on. And by that I mean those schemes or arrangements, businesses that function interstate, and therefore the attorney general of the State has great difficulty controlling them.

And that is why I feel those pyramid schemes with which you were so slow in moving on; the question of those package deals for tours and travel, which have been done in two States, as you know, in Illinois and in Florida; it is almost impossible for any other State attorney general to control them.

These are the things you ought to be directing your attention to. These are the things that a local, State government, cannot control. And if you do not, we are going to have to move into legislation to do it by regulation. It seems to me each part of this Government ought to function to do what it is particularly suited to do. I see no reason why the States cannot handle that, and many of them already have.

And therefore it seems when there are other things that States cannot handle, maybe we ought to examine the whole theory of what the Federal Trade Commission is supposed to do. Maybe we ought to confine it to interstate activities, in other words, businesses that operate interstate. (Hearing transcript, September 15, 1976, pp. 132-133.)

The Magnuson-Moss warranty—FTC Improvement Act authorized the Commission substantive rulemaking authority for unfair trade practices, which are "in or affect" interstate commerce. Thus, at the heart of the issue was: Should Congress have expanded the FTC's jurisdiction to such an extent? And, does such an expansion have an adverse effect on small business?

### 3. MERITS OF THE PROPOSED REGULATION

The actual merits of the proposed regulation of course depends upon one's value judgment. Subcommittee members differ, funeral directors differ, and no doubt FTC staff may differ, but it is of vital concern to all.

Mr. Angel articulated what could probably be considered the overall goal of the FTC in proposing the regulation:

Our position is—which returns to our rule—it should be up to the individual family member to make the arrangement, to choose as freely as possible the kind of funeral arrangements that meet their needs; free of any influence from the Federal Trade Commission, but also free from influence from a funeral director who is going to profit more on an elaborate funeral.

We are attempting by the regulations to provide information to consumers which will give them a broader range of choices. (Hearing transcript, Sept. 15, 1976, pp. 135-136.)

The matter of where a funeral director should charge for overhead cost on an itemized price list has been a subject of much debate. If it is attached to each component part, then the funeral in which the customer deletes more than the usual items can be unprofitable for the funeral home. If it is lumped together under professional services, then customers pay overhead for items not selected. Mr. Jensen, subcommittee minority counsel, raised the question as to cash advance items:

Mr. JENSEN. Your regulations prohibit the funeral director from adding on any expenses to their cash advance items, correct?

Mr. ANGEL. Items that are represented to be cash advances which the funeral director has advanced the customer, yes.

Mr. JENSEN. So, then, the way you have it set up, where that overhead charge essentially would be professional services, if the customer does not want some of the cash advance

items like flowers, like obituaries, or some of those items, then in your system what you are doing is simply charging him for the overhead anyway; right?

Mr. ANGEL. Well, in essence you are correct. Although, let me add, when you are talking about overhead, what we are talking about here is the funeral director as a real staff person at the mortuary, making phone calls to the newspaper, or to the cemetery, and so on; so the overhead expense that we are talking about refers to that funeral director's time, correct.

Mr. JENSEN. Service.

Mrs. FENWICK. Telephone calls, bookkeeping, writing down what it costs.

Mr. ANGEL. But if he does not keep those accurate records it is hard to allocate the costs of that specific operation. (Hearing transcript, Sept. 15, 1976, pp. 154-155.)

Regarding the proposed regulation's provision requiring the funeral director to furnish the customer with a form advising him that he "may want" to contact the cemetery—a competitor of the funeral director, Mr. Jensen asked:

Mr. JENSEN. Do you feel that is a good precedent to be setting regulations in business?

Mr. ANGEL. My personal opinion is that it is not a good precedent. We have drafted that provision with some reluctance, and only after considerable analysis that led us to conclude that without something like it—let me emphasize, the rule is in proposed form, and there may well be revisions made before the rule is recommended to the Commission for final determination, based on what we heard in the hearing process.

I do not think it is a good precedent, but I think this, or something like it, is necessary. (Hearing transcript, Sept. 15, 1976, pp. 158-159.)

A major issue pertaining to the regulation itself is that of definition of terms. Majority Counsel, Mr. Lynch, addressed the general issue of vagueness by posing some hypothetical situations:

Mr. LYNCH. . . . What is a funeral director allowed to say? The parents might say, "We just don't want to go through that, we don't think we can," and the question is: Can the funeral director say, "Well, I think you should consider everything, there could be a possibility that if you don't, in later months it can cause a lot of anguish, I have had experience in that field."

Mr. ANGEL. Yes; although again, we found out in the hearings that funeral directors will convey horror stories of what kind of psychological damage will be reaped on the individual if he does not have a full funeral service, and funeral directors really have no basis for making that kind of forecast.

You know, while we would be concerned about it, the rule does not have an explicit prohibition against that kind of language.

Mr. LYNCH. Well, this was not an example of a horror story.

Mr. ANGEL. The answer is, yes, he can say that.

Mr. LYNCH. On page 3, under Merchandise and service selection, "No. 4. Can a funeral director tell a family that the casket they are looking at would not show respect for their deceased mother. Is that disparagement?"

Mr. ANGEL. Well, my answer would be, as we view disparagement in the proposed rules, it probably would not be considered disparagement. It may be within the prohibition of section 453.4, which refers to when a funeral director would say it would show a lack of respect for a deceased person.

Mrs. FENWICK. You mean you are going to make rules on that?

Mr. ANGEL. The prohibition is on the face of the rule, yes.

Mr. LYNCH. Well, the next question, Is a memorial society funeral planner telling a family the purchase of the casket they want for someone whose funeral they are arranging would be burying the money in the ground disparagement?

Mr. ANGEL. First off, as I indicated, memorial societies are not within the rule. Secondly, that might or might not constitute the commonsense, or general legal notion of disparagement, it would not be illegal.

Mr. LYNCH. Going up to question 2, then. If a funeral director said, "Well, people buy all types of caskets. They usually talk it over for a while. After all, a lot of people will be coming to pay their last respects, so, great care should be taken when making all these final decisions." And of course he can put the emphasis on whatever words he wants. Is that disparagement?

Mr. ANGEL. I would say that that, standing alone, probably would not constitute disparagement. A funeral director who came in and said, "supposing I said that," we could never give him a blank check that that would never, under no circumstances, constitute disparagement. If a family decided to buy the least expensive casket and the funeral director gasped cast his eyes downward, shook his head, made reference to a dog, and then proceeded to make this statement, one might well conclude that disparagement was at least intended. (Hearing transcript, Sept. 15, 1976, p. 161-163.)

The subcommittee's hearing with the FTC staff cleared up many questions of the subcommittee and certainly brought to light differences of opinion and philosophy.

The hearing was not, however, the first meeting between some subcommittee members and the FTC staff responsible for the funeral rule. Former Chairman Hungate, Mr. McCollister, and Mrs. Fenwick testified at FTC hearings on the proposed funeral rule in Washington D.C. on July 20, 1976. Their testimony can be found in the FTC transcript, "In the Matter of Trade Regulation Rule Proceeding Concerning Funeral Industry Practices," Docket 215-46, pp. 10,571-10,686.



### CHAPTER III.—FINDINGS AND CONCLUSIONS

#### *A. Premise for Federal regulation*

The subcommittee starts with the premise that before Federal regulations are promulgated there must exist a demonstrable abuse and resultant need for regulation.

In a democracy, it is not required that the public prove why the Government should not regulate them; the burden is on the Government to show why they should issue regulations against their citizens. (Letter to William Golden, at FTC, from former Chairman William Hungate, July 30, 1976, p. 4.)

To date the FTC has not compiled an impressive record. At the initiation of their study the FTC had less than a dozen complaints. Today, as a result of publicity and requests from organizations to send letters to the FTC, they have approximately 1,000.

The Better Business Bureau does not list the funeral industry in the top 15 industries most complained about. (Hearings pt. III, p. 325.) From June of 1970 to December 31, 1974, there had been 4,639 complaints filed with Maine's Consumer Fraud Division, as reported to Representative Cohen, and only 4 of them related to the funeral industry. Mr. Conte claimed that the Massachusetts State Board of Funeral Directors average about seven complaints a year between 1970 and 1975. A witness from Missouri testified that in the 9 years he was Secretary of the State Board of Embalmers and Funeral Directors, 15 written complaints were filed and only 2 of them were consumer oriented. Mr. Russo reported that 12 complaints had been filed in Illinois. Mrs. Fenwick indicated that after New Jersey implemented its current funeral regulations, funeral complaints were relatively few.

The American Association of Retired Persons, on the other hand, testified to having received 15,000 letters in response to a 1974 article on the economics of dying, and receiving "40 to 50 letters a day from all over the country citing specific instances of unfair and deceptive practices" in the funeral industry. (Hearings III, p. 390.) It was later clarified that the 40 to 50 letters applied to 1 week. On April 2, 1976, majority and minority counsel visited the American Association of Retired Persons to read the letters and ascertain the quality of the complaints. At the time A.A.R.P. had 462 letters. In the memorandum counsel filed with the subcommittee, they said, in part:

Many of the letters were not substantive complaints. For example, someone would write in and say they agreed that funeral prices were too high and someone would cite no personal experience. Others wrote in requesting information on memorial societies. (Memorandum April 7, 1976.)



High prices do not necessarily mean that unfair or deceptive acts or practices exist in the marketplace.

The FTC staff, on the other hand, does not think the number of registered complaints ought to be the only indicator of the prevalence of unfair or deceptive acts or practices and they place emphasis on the proposition that a "bereaved purchaser is not emotionally able to bargain and is seldom even aware that he is being deceived or exploited". (Memorandum, p. 4.)

While the subcommittee finds merit in the skein of the FTC's subjective argument, we have not been persuaded that abuses in the funeral industry are as prevalent as the FTC would lead us to believe.

The subcommittee wishes to note that it contacted the Office of Consumer Affairs at the White House, and was contacted by the Consumer Federation of America and the Consumer Affairs Division of the Americans for Democratic Action. All three groups expressed interest in the subcommittee's hearings and in an opportunity to testify. But when extended an invitation, on more than one occasion all three groups declined to testify. The Office of Consumer Affairs, however, did forward to the subcommittee statements prepared for the FTC.

No doubt abuses exist, but testimony before the subcommittee leads us to believe that, for the most part, those abuses are confined to large metropolitan areas. The subcommittee abhors the idea of imposing uniform Federal regulations for the entire country when regulations directed at specific abuses in specific geographical areas might solve the problem.

#### *B. Subcommittee Comments on the FTC Staff Memorandum and the Proposed Regulation*

In analyzing the proposed T.R.R., the subcommittee relied extensively upon the FTC Staff Memorandum (Funeral Industry Practices: Proposed Trade Regulation Rule and Staff Memorandum, Division of Special Projects, Bureau of Consumer Protection, Federal Trade Commission, August 1975) for documentation and support for the T.R.R. The introduction of the staff memorandum states:

This memorandum supports the Funeral Industry Practices Trade Regulation Rule which has been proposed to correct the unfair and deceptive practices identified in the course of the staff's investigation. These abuses are industrywide, and staff is convinced that a Trade Regulation Rule is the most direct and efficient way to eliminate them.

The subcommittee finds the following three concepts employed in the proposed funeral T.R.R. to be the most egregious:

1. Section 453.3(a)(2) requires the funeral director to supply the customer with a form stating what is not required by law for a funeral.
2. Section 453.3(a)(3) requires the funeral director to furnish to a customer, upon request, a written legal explanation of legal requirements, including public health regulations, which necessitate the use of any services or merchandise.
3. Section 453.5(d)(1) requires the funeral director to furnish the customer with a form which suggests the customer "may want" to visit a competitor of the funeral directors.

The subcommittee considers the above proposals abhorrent to free enterprise and a requirement not imposed upon any other line of business. Requiring businessmen to spell out what is not required by law, furnish a legal explanation of laws and regulations associated with the industry, and advise customers to contact competitors demeans any honest, reputable businessman.

Economic regulations must balance the interests of consumers and business. These clearly do not. The subcommittee feels the promulgation of such rules will set a bad precedent and work to destroy the personal integrity, self-esteem, and community respect of honest, reputable small business men and women.

The subcommittee also finds the following sections of the regulation and staff memorandum objectionable:

#### 1. § 453.1 DEFINITIONS

Some of the regulation's definitions are incomplete, and in some instances, misleading. For example, "funeral industry service member" is defined as any "person, partnership, or corporation, or any employee or agent thereof, engaged in the business of selling or offering for sale, directly to the public, funeral services and merchandise; of preparing deceased human bodies for burial, cremation or other final disposition; or of conducting or arranging funerals." Yet the subcommittee has been told that the regulation does not apply to memorial societies.

While the regulation defines "funeral services," it never defines "memorial services," nor does it differentiate between "immediate cremation," and "cremation," implying throughout the regulation that cremation is the desired manner of disposition to save funeral service expenses.

#### 2. § 453.2 EXPLOITATIVE PRACTICES

##### *A. The regulation*

1. Requiring written or oral permission for embalming, under some circumstances, is too stringent. The subcommittee can appreciate that there will be times when relatives or legal representatives of the deceased cannot be located within 24 to 48 hours, in which time a body should probably be embalmed or refrigerated. Refrigeration imposes a greater expense upon customers than does embalming.

2. Requiring the funeral director to not charge a customer in excess of the amount of a cash advance item fails to consider the factor of overhead. The staff report says: "This is spurious, because the funeral director is paid directly for professional services which consist, in large part, of arranging for various cash advance items." (Memorandum, p. 35.) But here the FTC staff defeats themselves. They require the customer who does not want some cash advance items to pay the overhead for those items anyway.

3. Failure, on behalf of the funeral director, to pass on to customers the benefit of any rebates, commissions, or trade or volume discounts on cash advance items is a nonincentive for the funeral director to obtain any discounts, rebates, or commissions. The operation of this paragraph runs opposite to that of sound business practices of trying to maximize discounts, rebates, and commissions to improve one's profitability.

### *B. The memorandum*

The memorandum states that funeral directors have labored for decades to establish embalming as common practice, yet no discussion of this is presented nor is there any documentation. What makes the staff think the establishment of embalming was not a result of demand? The memorandum also states that "some funeral homes have a routine policy of embalment," yet the footnote lists only one funeral home.

The issue of religion, while vaguely touched upon here and in other parts of the memorandum, is never forthrightly discussed. The subcommittee feels that societal and religious ties and practices have a great deal to do with funeral services and the nature the service will take. Not to discuss this is to imply that the Nation's funeral directors are "the guiding hand" behind such practices. This certainly is not proven by the FTC staff's presentation and the fact that the issue was not addressed tends to show a degree of misunderstanding on the part of the FTC staff as to factors that determine funeral practices.

The memorandum also states in this section that "body grabbing" and "body holding" occur with some frequency. Not even half a dozen examples are presented to support this allegation.

While discussing the alleged practice of requiring a casket for cremation, the memorandum states "total funeral and burial expenses average \$2,000 plus." The key word here is "burial." Actually, funeral expenses average around \$1,300 in the Nation. The use of figures like \$2,000 in this manner is an unfair attempt to "play up" the real cost to support FTC staff feelings that funerals are overpriced to a great degree.

The staff study states that they "received more complaints about caskets being required for cremations \* \* \* than any other kind of funeral complaint." In their footnote, they list three complaints. FTC staff in testimony said they had received many complaints by phone and letter. Apparently, the FTC staff's understanding of substantial documentation is a bit different from the subcommittee's. They told us they had between 700 and 1,000 complaints since 1972. Approximately 10 million people died in this country in that period. One thousand complaints in 5 years is a .0001 level of consumer complaint. This is not only not substantial, it raises questions of even the significance involved.

The staff discusses funeral directors who think that encasing bodies that will be cremated in anything but a casket is undignified. They then state, "After all, no one tells a Rolls Royce dealer that he must offer Volkswagens." A flagrant statement such as this is totally out of place in a serious study. Such statements lend an "amateurish" and undignified tone to what should in all respects be a serious, well-documented, well-intentioned study.

In their treatment of profit on cash advances, important business concepts are involved. It should be noted that a lack of understanding shows through again in this portion of the memorandum. The cash advance items are not discussed in detail. For example, there is no evidence that the staff knows what is involved in the placing of an obituary notice. Often, long distance phone calls are involved. Time and money are consumed. Usually, a call back is required from the paper to verify the death and eliminate a hoax obituary. To expect the funeral director to accomplish the many cash advance purchases and not make a profit is unrealistic.

## 3. § 453.3 MISREPRESENTATIONS

*A. The regulation*

Two provisions of this section, (a) (2) and (a) (3), requiring funeral directors to spell out what is not required by law and furnish the customer, upon request, with a legal explanation of laws and regulations associated with funerals, have been discussed at the beginning of this section on subcommittee comments on the FTC Staff Memorandum and the proposed regulation.

*B. The memorandum*

The subcommittee questions what other industries must tell their customers what is not required by law. This may indeed be a disguised precedent-setter. It also is not clear who is responsible for the printed legal disclosure. It seems the staff is attempting to turn the director into a walking legal expert. The paperwork required here might even have an adverse effect. A consumer might resent all the detail and paperwork and feel the funeral director fostered the complicated paperwork for his own benefit.

## 4. § 453.4 MERCHANDISE AND SERVICE SELECTION

*A. The regulation*

The subcommittee finds the words "discourage," "discouraging," "disparage," and "disparagement," as used in this section too vague. Paragraph (c)(3)(1) makes it an unfair or deceptive act or practice to:

(3) discourage the purchase, by customers, of any funeral merchandise or service which is advertised or offered for sale by:

(i) disparage the quality, appearance or tastefulness of any such merchandise or service which is advertised or offered for sale;

(4) use any policy, sales plan, or method of compensation for salespersons which has the effect, in any manner, of discouraging salespersons from selling, or has the effect of penalizing salespersons for selling, any funeral merchandise or service which is advertised or offered for sale.

Any customer question about the quality of the merchandise sets the trap. An honest opinion as to the differences between goods could likely be considered discouraging or disparaging. An employee profit-sharing plan could be regarded as a plan for discouraging salespersons from selling low-cost merchandise; though the staff claims it does not mean that, it certainly is not clear from a reading of the regulation. The same holds for Paragraph (d) titled "Disparagement of Concern for Price."

*B. The memorandum*

The staff memorandum does nothing to clarify the intended meaning of "discourage" or "disparage," nor did the FTC staff in questions propounded in the hearings.



## 5. § 453.5 PRICE DISCLOSURES

*A. The regulation*

The requirement in paragraph (d) that the funeral director furnish the customer with a form stating, in part,

Before selecting any outer enclosure you may want to determine any applicable cemetery requirements as well as the offerings of your cemetery and funeral home

was discussed at the beginning of this section "Subcommittee Comments on the FTC Staff Memorandum and the Proposed Regulation" supra referring to advising customers that they "may want" to contact a competitor.

*B. The memorandum*

The memorandum supporting this section is based on the assumption that consumers have no conception of funeral costs. A survey is cited showing a 91-percent no response level to a question asking the average price of a funeral. The meaning of this is questionable. How many people could state the average price of a stereo-TV console, or a country club membership, or a 2-week European vacation? Pricing over the telephone is required, yet no survey on that was done. What burdens would it impose on a funeral home? What prices could or could not be quoted? What about the enforceability of the requirement?

## 6. § 453.6 INTERFERENCE WITH THE MARKET

*A. The regulation*

If a "funeral service industry member" does not include memorial societies, then memorial societies are left free to interfere with the market while funeral directors are not. May this not be considered an unfair act or practice?

*B. The memorandum*

While the staff memorandum speaks of the deficiencies of the funeral industry, it speaks only in a positive tone about memorial societies.

A third possibility, and possibly the most fruitful, is for consumers to organize. Memorial societies can develop the expertise necessary to bargain with funeral homes and can represent the interests of consumers in a way that funeral directors now profess to do (memorandum, p. 85).

This support is buttressed in an FTC pamphlet "The Price of Death: A Survey Method and Consumer Guide for Funerals, Cemeteries, and Grave Markers."

One type of prearrangement is membership in a memorial association or society. The cost of joining a memorial society ranges from \$5 to \$20. The society may have a contract with one or more funeral homes which usually offer low prices to members for funeral home services and merchandise and cremation or other disposition of remains. Memorial societies advocate simple, low-cost arrangements. They are listed in the yellow pages of the telephone book under "Memorial

Societies" or "Associations." More information about memorial societies in your area can be obtained by writing to the Continental Association of Funeral and Memorial Societies, Inc., 1828 L Street, NW., Washington, DC 20036. ("The Price of Death," p. 6-7.)

The staff memorandum, in this section, also states, "... The growth in popularity of cremations . . ." (Staff Memorandum, p. 95). From their own figures (Staff Memorandum, p. 28), it does not seem fair to use "growing popularity" when discussing a 1-percent rise in cremations in 10 years.

#### 7. § 453.7 RETENTION OF DOCUMENTS

The staff memorandum states "... recordkeeping requirements . . . which constitute a very minimal burden on funeral directors . . ." and "... there is not likely to be extensive opposition to the recordkeeping requirements" (Staff Memorandum, p. 105). Testimony developed at the subcommittee hearings did not necessarily prove those statements to be true.

#### 8. STAFF MEMORANDUM CONCLUSION

The conclusion of the staff memorandum states:

Certain consumer problems derive primarily from societal and psychological conditions which are endemic to the bereaved and will change only gradually, along with social mores and societal attitudes . . . (Staff Memorandum, p. 106).

In testimony, the staff told us that the rule's aim is to "... eliminate abuse, and not to do anything about the social forces." (Hearing transcript, Sept. 15, 1976, p. 178.) The subcommittee questions this. This rule involves societal, psychological and religious questions. The staff's promotion of memorial societies by their actions and statements seems to contradict what the FTC staff told us they were trying to do. In fact, this legislation may have a significant impact on society's mores and customs.

The subcommittee found the staff memorandum much as did columnist James J. Kilpatrick:

The proposed regulation is based upon a staff study that is curiously shrill and almost contemptuous in its tone. Some animus plainly was at work in the drafting of these charges. The typical funeral director emerges from this report as a greedy body snatcher, exploiting bereaved relatives by "total and subtle confusion." He is "terrified" or "horrified" by the thought of Federal regulation. His purpose is to steer the family into the highest priced funeral by shaming the family into buying a costly casket, lying to them about State laws and charging them for services "they don't really want." ("From Cradle—To Grave," Washington Star, May 29, 1976.)

Not to mention the fact that charity funerals, which are frequently given by funeral directors, were never even discussed.

However, the subcommittee's position is not to be taken as an endorsement of the way the funeral industry is being conducted 100 percent of the time. There are abuses. We just feel, as regards the regulation itself, that it goes too far in restricting business decision-making. It is overregulation, and imposes an overburdensome amount of paperwork on small businesses.

On the other hand, we do recognize merit in some of the concepts behind the proposed regulation; namely, that of complete price disclosure and the educating of consumers to make more knowledgeable consumer decisions.

### *C. The question of FTC jurisdiction*

Considering the local nature of the business, the incidental effect on interstate commerce, and the lack of demonstrable abuse, the subcommittee finds no compelling need for Federal regulation of the funeral industry, and concludes that the interests of the public and small business will be better served if the funeral industry is regulated by the States.

The subcommittee is cognizant of the dilemma in which the FTC must find itself in trying to adhere to the clamor for deregulation and still follow the mandate of the Magnuson-Moss Act.

The subcommittee questions the efficacy of the FTC's promulgation of substantive rules for businesses which operate essentially intrastate, such as the funeral industry. The subcommittee also questions the efficacy of the FTC's promulgation of substantive rules which preempt State law. While the Magnuson-Moss Act itself is silent on the issue of FTC preemption of State law, the Senate and House reports accompanying the act are confusing. Referring to the Commission's new substantive rulemaking authority, House Report 93-1109 states:

The expansion of the FTC's jurisdiction made by this section 201 is not intended to occupy the field or in any way to preempt State or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission.

Senate Report 94-151 states:

State and local consumer protection efforts are not to be supplanted by this expansion of jurisdiction.

Although these paragraphs may be interpreted to mean that FTC regulations may not preempt conflicting State laws, they may also be interpreted to mean merely that the States may continue to legislate in areas over which the FTC has jurisdiction, provided such State legislation does not conflict with FTC regulations.

If the funeral industry is to serve as a guide, FTC preemption of State law and FTC regulation of businesses which operate essentially intrastate imposes an adverse effect on small business.

*D. Effect On Small Business*

"But generally it has appeared to me," observed Congressman Bedell, "that the more we impose bureaucratic regulations upon any industry, the more difficult we make it for the small operator to continue to exist." (Hearings pt. III, p. 463.)

The subcommittee finds itself in complete agreement with Mr. Bedell's conclusion. Government regulations so often have a distinct anti-small-business bias because the fixed costs of compliance can be better borne by larger firms having a greater number of income-producing units. The proposed FTC funeral T.R.R. is no different. Large funeral homes can spread the cost of compliance with the regulation (e.g., administrative costs, capital investment, legal fees, and the compiling, printing, and completing of forms) over a greater number of funerals, thus deriving a competitive advantage from the cost of complying with the regulation.

According to *Business Week* magazine—

The pinch of lost volume and increased costs of doing business will be hardest on the 50 percent of U.S. funeral homes that conduct fewer than 100 funerals a year. (*Business Week*, October 6, 1975.)

The article then quotes Robert L. Waltrip, chairman of Service Corp. International, the largest funeral operator in the country:

Rules like these mean a real opportunity to us because independent funeral directors will be more willing to join our company.

SCI is the largest funeral operator in the country with 161 funeral homes, 8 cemeteries, and 10 crematories. In 1975 it earned \$4.8 million on revenues of \$75 million, according to *Business Week*.

Besides, by accelerating the trend toward bigness, the proposed regulation does damage to the professional reputation of funeral directors.

As Congressman McCollister said at the hearings the FTC held on the proposed regulation:

The FTC would require funeral directors to provide consumers with a statement telling them what is not required by law for funerals. It would demand they tell their customers where they can buy like goods for less.

It is anathema to the American enterprise system. The consequences of this aspect of the regulation will be to destroy the personal integrity, self-esteem, and community respect of honest funeral directors, who, in my opinion, constitute the vast majority of the funeral directors in this country.

Mr. McCollister later said, in the question and answer session—

The inference that runs through the regulation is that there is gross consumer fraud and misrepresentation and that there are unfair, deceptive practices in great number. I think that is on the surface, injurious to the reputation of an industry.



The subcommittee believes the regulation, as a result of its strict detail, will seriously infringe upon the decisionmaking rights of businessmen. By forcing funeral directors to itemize all component parts of a funeral, the regulation is prohibiting the funeral director from structuring his business according to the clientele he seeks to serve. Priorities and preferences differ as to people, businesses, and geography and the regulation ought to allow for that kind of flexibility.

The subcommittee also believes that the paperwork imposed upon the small funeral home by the proposed regulation is overburdensome, forcing the funeral director to raise costs, hire additional employees, or go out of business.

The subcommittee concludes that the proposed FTC regulation, if enacted, will adversely affect the small funeral homes in this country.

#### *E. The Cost of Government Regulation*

Since January of 1975 the FTC has spent \$449,000 proposing the substantive funeral T.R.R. This does not include staff time spent in 1972, 1973, or 1974, the staff's preliminary investigation, price survey in the District of Columbia, or formal investigation between October 1973 and December 1974. Nor does the cost represent what the FTC will yet spend in revising, promulgating, or enforcing the T.R.R.

#### CHAPTER IV.—RECOMMENDATIONS

On the basis of the testimony, evidence, and findings and conclusions, the subcommittee recommends:

A. That copies of this report be forwarded to the Chairmen and Ranking Minority Members of the appropriate legislative committees of the Congress so they are advised of the following issues that arose during the Subcommittee hearings:

1. Complaints from funeral counsel and others that witnesses at the hearings conducted on the rule were not put under oath.

2. The funeral representatives request to cross-examine Federal Trade Commission staff was turned down.

3. The expenditures on this rule to date and the manner in which they were approved.

4. The Federal Trade Commission staff's comments on various business practices and their views on oversupply of firms in the funeral industry.

B. That the Federal Trade Commission review the matters incorporated in this report with emphasis on the following issues:

1. The value of sworn as opposed to unsworn testimony taken during Commission trade rule hearings.

2. The question of whether Federal Trade Commission staff should submit to cross-examination at Commission trade rule hearings.

3. To what extent study should be done on the economic impact of a Commission's proposed rule on small businesses in the particular industry under examination.

At what stage the study should be done, and when should it be available to the Committee.

4. The Commission give early consideration to a shift in emphasis from the investigation and regulation of businesses which operate primarily and traditionally in intrastate commerce, to those businesses which operate primarily and traditionally in interstate commerce, thereby reemphasizing the Commission's compliance with the intention of Congress in its mandate to the Federal Trade Commission.

5. Whether the Commission through its advisory boards and field office operations and the appropriate staff at the Washington headquarters cannot work with State or local government to attack flagrant industry abuses in those jurisdictions where they occur in lieu of a Federal regulation.

The Commission shall forward whatever views they wish to submit on these issues in writing to the Committee by January 5, 1977.

C. That the Federal Trade Commission:

Place this final report and all Subcommittee hearings held on this matter including the September 27, 1976 hearing in the Commission's hearing record on the funeral rule.

## APPENDIX

SEPTEMBER 13, 1976.

*Costs allocable to proposed funeral rule (January 1975 to date)*<sup>1</sup>

Contracts.....	\$11,325
Public participation funding.....	79,301
Travel expenses for hearing witnesses.....	2,640
Staff travel expenses <sup>2</sup> .....	21,000
Court reporter and transcripts.....	30,000
Printing, Xeroxing and miscellaneous.....	12,000
	156,266
Staff time:	
Headquarters staff (hours).....	9,400
Regional office staff (hours).....	15,000
	24,400
Can be converted to approximate dollars using factor of \$12 per hour times 24,000 hours.....	292,800
Total.....	449,066

<sup>1</sup> Based upon available actual and estimated figures.

<sup>2</sup> Includes travel expenses for Presiding Officer and assistant as well as staff expenses.

### PUBLIC PARTICIPATION

Consumer group	Type of participation	Amount of funding
Consumers Union.....	Written analysis of proposed rule.....	\$3,980.00
New York Public Interest Research Group.....	Hearing participation <sup>1</sup> .....	8,377.00
Continental Association of Funeral and Memorial Societies, Inc.	Hearing participation <sup>2</sup> .....	18,170.00
Consumer Affairs Committee, Americans for Demo- cratic Action, and National Council of Senior Citizens.	Hearing participation <sup>3</sup> .....	18,139.17
California Citizens Action Group.....	Hearing participation <sup>4</sup> .....	15,558.00
Central Area Motivation Program, Seattle, Wash.....	Hearing participation <sup>1</sup> .....	7,410.00
Arkansas Consumer Research.....	Hearing participation <sup>1</sup> .....	7,694.00
Total.....		79,301.17

<sup>1</sup> Attorney time (in and out of hearing); preparation of testimony; travel and other expenses.

<sup>2</sup> Attorney time (in and out of hearing); preparation of testimony; national consumer survey; hiring of three consultants; travel and other expenses.

<sup>3</sup> Attorney time at 2 hearings (in and out of hearings); preparation of testimony; hiring of 2 consultants; travel and other expenses.

<sup>4</sup> Attorney time (in and out of hearing); consumer survey; travel and other expenses.

## FUNERAL TRADE REGULATION RULE—CONTRACTS

Source	Service provided	Amount of contract
Dr. Richard Kalish, psychologist, Graduate Theological Union, Berkeley, Calif.	National survey of consumer experiences and preferences regarding funeral arrangements.	<sup>1</sup> \$5,200
Ms. Marilyn Simmons, consumer behaviorist, Chicago, Ill.	Preparation of data previously collected on level of consumer knowledge about funeral arrangements.	75
Dr. John Wallace, psychiatrist, Seattle, Wash.-----	Analysis of the psychological state of mind of the bereaved consumer.	150
Mr. Guenter M. Conradus, economist, Mathematical Sciences Northwest, Seattle, Wash.	Analysis of economic structure of funeral industry particularly in the Pacific Northwest and possible economic impact of proposed rule.	<sup>2</sup> 2,900
MacFarlane & Company, Inc., management consultant, Atlanta, Ga.	Study of possible economic impact of proposed rule on a representative sampling of funeral directors.	<sup>3</sup> 3,000
Total-----		11,325

<sup>1</sup> Total payment may be slightly higher due to over-runs.

<sup>2</sup> Bill from contractor has not yet been received.

<sup>3</sup> An additional \$951.55 has been requested by contractor for over-runs.







